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## THE TRIAL OF CRIMINAL CASES.

(LUDWELL MSS.)

The Constant Custome has been in Virginia for the Governor and Council to be the only Judges in Criminal Cases. This Custome has been Confirmed as a privilege to the people inhabiting that Colony by the Royal Charter, dated the 10th of October, 1676, and by some Acts of Assembly, particularly by the 24th, in the Printed book, which Act is either confirmed by an Act of Assembly past in the year 1705, [?] or else is at least not repealed.

This Custome has also been supported by reason, because the Council are appointed by the King out of the Inhabitants of that Colony who have the best abilities and the best Estates, and 'tis fit that the Lives and Fortunes of all that dwell there should be trusted to persons so qualified, Besides, if a Governor should be left at Liberty to name what Judges he pleases for the Tryal of any prisoner, 'twill be in his power at any time either to acquit the guilty or condemn the innocent, especially since the sheriffs who return the Jurys make great profit of their places, and are appointed by the Governour.

Neither has this Custome ever been interrupted without very extraordinary reason, till about 5 years ago the Lieu' Governour [Spotswood] thought fit to join some other persons with the Council for the Tryal of an ordinarily felon, but upon the Remonstrance of the Council, he thought convenient not to repeat that method any more, til the beginning of June last, when he did again without the advice of the Council join four other persons with them, this he was pleased to do by Virtue of a general Instruction, empowering him to appoint Courts of Oyer and Terminer, without specifying whom he shall appoint Judges of such Courts.

Now the Questions Are—

I. Whether the Lieut. Governour by vertue of the foregoing Instructions, ought not to appoint such Judges only as are consistent with the terms of the Royal Charter granted to that Colony, and agreeable to the laws and constant custome of the Coun-

try, and not such Judges as are contrary to both, especially since the Council have done nothing to forfeit that Jurisdiction and no advantage can possibly be assigned by such an alteration, but a great deal of Inconvenience.

2. Whether if there were neither Law nor Charter against it, every Governour of His Majestys Plantations may appoint unusual Judges by a Commission of Oyer and Terminer, without the advice of the Council, especially Since such an uncontrollable power would put the Lives, the Libertys and Estates of all the good Inhabitants of the Plantations into the hands of their respective Governours.

In answer to the first Query, I conceive the 24th Act in the Printed book intended to lodge the power over Criminal cases in the General Court, which I take to be a Restriction of the other ordinary Courts of the County, but I do not apprehend that the Kings power of Granting Commissions of Oyer and Terminer is thereby restrained, which may be very proper upon special emergencys which may happen, though the Act intended for the ordinary regular proceedings, all criminal cases should be at the General Court, the Charter and the usage since does not p'clude the crown from the power of granting a concurrent Jurisdiction if the Crown should find it requisite.

In answer to the Second Query, I think the giving a power to Governour to appoint such Commissions (unless upon any extraordinary emergency which may require it,) a very dangerous power, for that he may have the lives and libertyes of all who oppose any of his measures at his mercy, therefore I humbly conceive that instructions to observe the Act of Assembly in all ordinary affairs as was intended by that Act and let Justice take its course in that channel, as seeming to be most impartial and indifferent for the reasons given in the Act, Vizt: amongst others the ability and Judgement of the Jurors who attended the General Courts would be most for the safty of the people, of the Country and most likely to prevent any arbitrary measures in a Governour.

The 19th of December, 1717.

WM. THOMSON.